73

(5)

No. 07-976

FILED
MAY 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., OMNIPOINT COMMUNICATIONS, INC. D/B/A T-MOBILE, AND TMO CA/NV, LLC,
Petitioners,

v.

JENNIFER L. LASTER, ANDREW THOMPSON, ELIZABETH VOORHIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JAMES C. GRANT
DAVIS WRIGHT TREMAINE LLP
1201 THIRD AVENUE
SUITE 2200
SEATTLE, WA 98101-3045
(206) 626-6000

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PETER C. PFAFFENROTH
JAMES C. OWENS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 5, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
A. This Case Implicates A Square Conflict Over The Enforceability Of Individual Arbitration Under The FAA	3
B. The Decision Below Violates The FAA And Conflicts With This Court's Decisions	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Arizona v. *Evans*, 514 U.S. 1 (1995) 7
Brown v. *Texas*, 522 U.S. 940 (1997) 5
Circuit City Stores, Inc. v. *Gentry*, No. 07-998 (U.S. Mar. 31, 2008) 5
Cregg v. *Ministor Ventures*, 148 Cal. App. 3d 1107 (1983) 10
Discover Bank v. *Superior Court*, 113 P.3d 1100 (Cal. 2005) 6, 7, 9
Gay v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007) ..... *passim*
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 9, 10
Halprin v. *Verizon Wireless Servs., LLC*, No. 07-4015, 2008 WL 961239 (D.N.J. Apr. 8, 2008) 4
In re Hammond, 27 F.3d 52 (3d Cir. 1994) .. 1, 4
Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) 6, 10
Kinkel v. *Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006) 6
Mariana v. *Fisher*, 338 F.3d 189 (3d Cir. 2003) 1, 4
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 2
Moses H. Cone Mem'l Hosp. v. *Mercury Const. Corp.*, 460 U.S. 1 (1983) 11
Muhammad v. *County Bank*, 912 A.2d 88 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007) 6
PacifiCare Health Sys., Inc. v. *Book*, 538 U.S. 401 (2003) 8
Perry v. *Thomas*, 482 U.S. 483 (1987) 2, 3
Scott v. *Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) 6

TABLE OF AUTHORITIES – continued

	Page
Shroyer v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)	6, 8
Szetela v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002)	6
Thibodeau v. *Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006)	6
Tunkl v. *Regents*, 383 P.2d 441 (Cal. 1963)	10
Vilner v. *Crocker Nat'l Bank*, 89 Cal. App. 3d 732 (1979)	10
Volt Info. Scis., Inc. v. *Board of Trs.*, 489 U.S. 468 (1989)	9
Weinsten v. *AT&T Mobility Corp.*, No. 07-2880, 2008 WL 1914754 (E.D. Pa. Apr. 30, 2008)	4
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949)	4

STATUTES

9 U.S.C. § 2	2, 9, 10
Cal. Civil Code § 1668	10

SCHOLARLY AUTHORITY

1 Witkin, *Summary of California Law* (10th ed. 2005)	10

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In their Petition, T-Mobile USA, Inc., OmniPoint Communications, Inc. d/b/a T-Mobile, and TMO CA/NV, LLC (collectively, "T-Mobile") showed that the Ninth Circuit's refusal to enforce individual arbitration in accordance with the terms of the parties' agreement conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), is inconsistent with the decisions of three additional federal circuits, and cannot be reconciled with this Court's decisions applying the Federal Arbitration Act ("FAA"). Pet. 2-3, 14-22, 25-29. T-Mobile further showed that this issue is one of recurring importance that affects contracts that benefit countless consumers and businesses nationwide. *Id.* at 4, 13-14, 22-25.

Respondents do not dispute the vital importance of the issue presented. Rather, they argue, erroneously, that "[t]here is no conflict" over the question presented because the FAA preemption ruling by the Third Circuit in *Gay* "does not reflect the holding of . . . any court anywhere." Opp. 8, 10. As shown below, the FAA ruling in *Gay* unquestionably was a holding of that court, which is binding precedent in the Third Circuit, see, *e.g.*, *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003); *In re Hammond*, 27 F.3d 52, 57 (3d Cir. 1994), and which conflicts directly with the decision of the Ninth Circuit below, Pet. App. 2a-3a. Moreover, the decision below implicates a broader conflict with four courts of appeals that have ruled that the FAA mandates enforcement of individual arbitration because it provides for the effective vindication of rights by consumers. Pet. 20-

22 (citing decisions of the Third, Fourth, Seventh, and Eleventh Circuits).

Nor do respondents' arguments on the merits provide a basis for denying review. Opp. 21-23. Under the FAA, agreements to arbitrate are enforceable as a matter of federal law save for "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The *Shroyer/Discover Bank* standard adopted by the court below applies only to a subset of "consumer contract[s]" and thus is not a basis for refusing enforcement of "any contract." Contrary to respondents' core argument, courts may not refuse to enforce arbitration procedures merely because they do not mirror those already available in court litigation. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). Indeed, respondents' position undermines the principal benefit of arbitration – providing parties an alternative to the costs and delay associated with litigation. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

T-Mobile's arbitration agreement provides for an informal, streamlined and effective method of individual dispute resolution that allows respondents to vindicate their substantive rights by obtaining the same recovery on their individual claims that would be available in court. Both T-Mobile and respondents benefit from this method of dispute resolution. As explained in *Perry*, 482 U.S. at 492 n.9, and by the Third Circuit in *Gay*, 511 F.3d at 395, under the FAA, courts may not refuse to enforce the parties' agreement to arbitrate individually by "hold[ing] that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.*

In sum, the petition should be granted.

A. This Case Implicates A Square Conflict Over The Enforceability Of Individual Arbitration Under The FAA.

Respondents' lead argument is that there is no conflict among the lower courts because the FAA ruling in *Gay* does not "reflect the holding of the Third Circuit" and that its reasoned analysis of the FAA instead should be dismissed as mere "speculative closing remarks." Opp. 1, 10. That argument should be rejected.[1]

In *Gay*, the Third Circuit carefully considered and rejected plaintiff's argument that, under Pennsylvania law, the parties' agreement to arbitrate individually was unenforceable because it was unconscionable. 511 F.3d at 392-95. After ruling that individual arbitration was enforceable under Virginia law, the *Gay* court addressed plaintiff's argument that the arbitration clause was unconscionable under Pennsylvania law. *Id.* Applying this Court's decision in *Perry*, 482 U.S. at 491, the Third Circuit ruled that the FAA preempted Pennsylvania law that otherwise would hold the agreement to arbitrate unconscionable because it "provides [for] arbitration of disputes on an individual basis." 511 F.3d at 395.

As T-Mobile showed previously, Pet. 14-20, the Third Circuit's ruling squarely conflicts with the

---

[1] Respondents do not and cannot dispute the importance of the question presented. *See* Brief for *Amicus Curiae* CTIA – The Wireless Ass'n In Support of Petitioners 2 ("the Ninth Circuit has undermined the utility of arbitration agreements and has cast uncertainty on the provisions contained in contracts of hundreds of millions of wireless customers"); Brief of AT&T Mobility LLC as *Amicus Curiae* In Support of Neither Party 4 (the question presented "is an important and recurring one").

decision below, which holds that the FAA does not compel enforcement of an agreement to arbitrate individually, Pet. App. 3a. The Third Circuit's holding in *Gay* cannot be so blithely dismissed. Opp. 1, 10. The *Gay* court disposed of the plaintiffs' unconscionability challenge on two grounds: one based on Virginia law and one based on FAA preemption. In the Third Circuit, as in this Court, "'an alternate holding has the same force as a single holding; it is binding precedent.'" *Mariana*, 338 F.3d at 201 (quoting *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982)); *In re Hammond*, 27 F.3d at 57 ("This panel is also bound by the alternate holding [in prior Third Circuit decisions]"); *accord Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum").

The *Gay* court's FAA preemption ruling is thus binding on district courts in the Third Circuit and may not be "overrul[ed]" by a "subsequent panel" absent rehearing en banc. *Mariana*, 338 F.3d at 201 (internal quotation marks omitted). Indeed, since T-Mobile filed its petition, federal district courts within the Third Circuit have relied on *Gay*'s FAA preemption ruling to reject state-law challenges to the enforcement of agreements to arbitrate in cases involving "class action waivers." See *Weinsten* v. *AT&T Mobility Corp.*, No. 07-2880, 2008 WL 1914754, at *5 (E.D. Pa. Apr. 30, 2008) (rejecting challenge to "class action waiver" based on "the Third Circuit's decision in *Gay*"); *Halprin* v. *Verizon Wireless Servs.*, LLC, No. 07-4015, 2008 WL 961239, at *6 (D.N.J. Apr. 8, 2008) (rejecting challenge to "class action waiver" because, under *Gay*, "the

uniqueness of the arbitration provision . . . is insufficient to maintain a claim of unconscionability").[2]

Given the indisputable conflict in analysis, respondents suggest that the Third Circuit in future cases might not follow *Gay* because it was based upon Pennsylvania state-law decisions that the Pennsylvania Supreme Court has "discredited" and "abrogated" because they "reflect[] an improper presumption in favor of unconscionability." Opp. 12 (citing *Salley* v. *Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007)). That argument fails because the *Gay* court was aware of the Pennsylvania Supreme Court's decision in *Salley*, and expressly concluded it did not affect its conclusion. 511 F.3d at 394 n.18 (*Salley* arose "in a very different context from that here").

Respondents next contend that the "'conflict' claimed by T-Mobile arises not from conflicting approaches to the federal-law question presented, but rather on underlying differences in state law." Opp. 14; see *id.* at 2 ("*Gay* . . . merely identifies a potential difference in state law"). Respondents' argument ignores that, in these decisions, each of these state courts applied the very same legal analysis that the Third Circuit in *Gay* ruled was preempted by the

---

[2] Respondents mistakenly argue that the denial of certiorari in *Circuit City Stores, Inc.* v. *Gentry*, No. 07-998 (U.S. Mar. 31, 2008), addressed "the same question" presented here. Opp. 1. In *Gentry*, the California Supreme Court, on an interlocutory basis, adopted a standard for assessing the enforceability of individual arbitration of employment disputes separate and apart from the "unconscionability" standard applied by the Ninth Circuit in this case. There is no similar jurisdictional issue here. In any event, "the Court's action denying certiorari does not constitute either a decision on the merits of the questions presented, or an appraisal of their importance." *Brown* v. *Texas*, 522 U.S. 940, 942 (1997) (Stevens, J., respecting denial of certiorari) (citation omitted).

FAA. See Pet. 17-18 & nn.1-2 (explaining that decisions of the First Circuit, Washington Supreme Court, and New Jersey Supreme Court all followed the California Supreme Court's decision in Discover Bank).[3] In each of these states, agreements to arbitrate consumer claims individually were deemed "unconscionable" because they do not provide class-action procedures already available in litigation.

Finally, contrary to respondents' claim of "unanimity" among the lower courts, Opp. 1, 18-20, the *Gay* court's FAA ruling implicates a broader conflict among the federal courts of appeals. *Gay* based its FAA preemption ruling on a prior holding of that Circuit in *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000), where the court ruled that individual arbitration allowed for the effective vindication of rights by consumers and that "[w]hatever the benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.'" *Id.* at 375,

---

[3] In *Thibodeau* v. *Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006), the Pennsylvania court based its refusal to enforce the parties' agreement to arbitrate individually on California law, as reflected in *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002). *Szetela*, in turn, provided the analytical basis for the California Supreme Court's decision in *Discover Bank* v. *Superior Ct.*, 113 P.3d 1100 (Cal. 2005), which, in turn, was embraced by the Ninth Circuit in *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007). Likewise, the high courts in New Jersey, Illinois, and Washington each relied upon the same California law as the Pennsylvania court in *Thibodeau*. See *Muhammad* v. *County Bank*, 912 A.2d 88, 99 (N.J. 2006) (following *Discover Bank*), *cert. denied* 127 S. Ct. 2032 (2007); *Kinkel* v. *Cingular Wireless LLC*, 857 N.E.2d 250, 271 (Ill. 2006) (looking to state cases such as *Discover Bank* "to discern a pattern that might guide us"); *Scott* v. *Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (relying upon "our sister court" in *Discover Bank*).

quoted in Gay, 511 F.3d at 394. The ruling in *Johnson* upholding individual arbitration under the FAA was adopted by the Fourth, Seventh, and Eleventh Circuits. See Pet. 21-22. In stark contrast, the California Supreme Court rejected the Third Circuit's *Johnson* decision in *Discover Bank*, 113 P.3d at 1109, which was the basis for the Ninth Circuit's decision in *Shroyer* and that of the panel in this case.

Equally baseless are respondents' claims that review would "affirmatively interfere with the ongoing evolution" of agreements to arbitrate, Opp. 7, or that this case is a "poor vehicle" to resolve the conflict, *id.* at 20.

Respondents argue that review by this Court "would risk hindering the natural evolution" of a "new generation of agreements." *Id.* at 20. That argument is exactly backwards. The "evolution" of arbitration agreements has been shaped by judicial decisions interpreting and misinterpreting the proper scope of the FAA. As a result of the conflict among these decisions, an agreement to arbitrate on an individual basis that would be enforceable in the Third Circuit would not be enforced in the Ninth Circuit or in California courts based upon those courts' differing views of the requirements of federal law.

Resolution of that conflict will not "hinder" the further development of agreements to arbitrate, but will leave parties better able to make informed decisions regarding those agreements. Such development is best fostered when there is definitive guidance regarding the requirements of the FAA, rather than blind speculation about what incentives might be sufficient to pass muster under the competing approaches applicable in various jurisdictions throughout the country. Cf. *Arizona* v. *Evans*, 514

U.S. 1, 8 (1995) (a ruling by this Court facilitates further development by "disabus[ing]" courts and parties of their "erroneous view" of what federal law requires).

Finally, respondents assert that this case is not a proper vehicle because "it is doubtful that the T-Mobile arbitration agreement provides for the recovery of attorneys' fees where available under the applicable substantive law." Opp. 20; cf. AT&T Mobility Br. 20 (arguing that availability of attorneys' fees "is not clear"). That is not so. T-Mobile explained in the courts below that (i) the parties' agreement allows the arbitrator to "award as much relief as a court having jurisdiction in the place of arbitration," Pet. App. 36a-37a, and (ii) T-Mobile subsidizes the costs of arbitration, and even those subsidized costs are subject to waiver, *id.* at 36a; see also T-Mobile's Opening Ninth Circuit Br. 49 n.26.[4]

B. The Decision Below Violates The FAA And Conflicts With This Court's Decisions.

On the merits, respondents assert that T-Mobile's position "bristles" with "hostility" to arbitration and "class arbitration in particular," Opp. 3, 7, and that

---

[4] The Ninth Circuit concluded (Pet. App. 2a) that T-Mobile's agreement was "not substantively distinguishable from the Cingular arbitration agreement" at issue in *Shroyer*, 498 F.3d at 976, *i.e.*, an agreement that allowed for recovery of attorneys' fees, *id.* at 986. But even if there were a doubt whether the arbitrator could award respondents "award as much relief as a court having jurisdiction in the place of arbitration," Pet. App. 37a – and there is none – this Court has held repeatedly that "the proper course" in these circumstances "is to compel arbitration." *PacifiCare Health Sys., Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (following *Vimar Seguros y Reaseguros S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995)).

the decision below properly interpreted the FAA in accordance with this Court's decisions, *id.* at 21-23. Both arguments should be rejected.

First, respondents' "hostility" argument betrays a fundamental misunderstanding of the purpose and benefits of arbitration under the FAA. According to respondents, courts can insist that arbitration precisely mimic litigation because such requirements would place arbitration on the "'*exact same footing*'" with litigation. Opp. 22. But, the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). As this Court has explained, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Under the approach adopted by the Ninth Circuit and California Supreme Court, agreements to arbitrate on an individual basis are unenforceable precisely because their procedures differ from those in court litigation. Pet. 12-13, 28-29.

Second, Section 2 of the FAA mandates the enforcement of agreements to arbitrate save upon grounds available for the "revocation of any contract." 9 U.S.C. § 2. On its face, the test adopted by the California Supreme Court and adopted by the Ninth Circuit below applies only to certain consumer contracts, and not "any contract," as required by the FAA. See *Discover Bank*, 113 P.3d at 1110.

Respondents argue that the Ninth Circuit merely applied the generally-applicable principle that California will not enforce contract provisions that serve to exculpate a party from liability. Opp. 23. But the standard applied by *Discover Bank* and

Shroyer applies solely to a subset of consumer contracts, rather than "any contract," as required by the FAA. Moreover, California law is clear that the bar against exculpatory contracts set forth in California Civil Code § 1668,[5] "does not apply to every contract," *Vilner* v. *Crocker Nat'l Bank*, 89 Cal. App. 3d 732, 735 (1979), but only to contracts that involve the "public interest." *Tunkl* v. *Regents*, 383 P.2d 441, 443 (Cal. 1963); see also *Cregg* v. *Minister Ventures*, 148 Cal. App. 3d 1107, 1111 (1983) (same); 1 Witkin, *Summary of California Law* § 660, at 737-38 (10th ed. 2005) (same). Thus, the presumption against exculpatory contracts does not provide a basis for refusing to enforce an agreement to arbitrate individually because it is not a "ground[] as exist[s] in law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

Moreover, the suggestion that individual arbitration would "exculpate" petitioners from liability simply ignores the contrary decisions of multiple federal courts of appeals, which have held that individual arbitration allows consumers effectively to vindicate their statutory rights. *E.g.*, *Johnson*, 225 F.3d at 373. The contrary conclusion adopted by the Ninth Circuit in *Shroyer*, *i.e.*, that the attorneys' fees that an arbitrator indisputably could award if respondents prevail on their substantive claims would be inadequate, hearkens back to the "longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Such a view cannot be reconciled with the "liberal federal policy

---

[5] California Civil Code § 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); cf. *Gay*, 511 F.3d at 393 n.17 (noting that businesses have "a legitimate reason to seek to avoid expensive litigation to resolve disputes with [their] customers and instead resolve [their] disputes less formally and probably less expensively in arbitration").

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES C. GRANT
DAVIS WRIGHT TREMAINE LLP
1201 THIRD AVENUE
SUITE 2200
SEATTLE, WA 98101-3045
(206) 626-6000

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PETER C. PFAFFENROTH
JAMES C. OWENS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 5, 2008